SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. ~~555~~ 18

JACK T. RAINWATER ET AL., *Petitioners,*

v.

THE STATE OF FLORIDA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

ALFRED L. SCANLAN
DAVID BOOTH BEERS
734 Fifteenth Street, N.W.
Washington, D. C. 20005
Attorneys for Petitioners.

Of Counsel:

J. EDWARD WORTON
525 Pan American Bank Building
Miami, Florida 33131

MALLORY H. HORTON
308 Concord Building
Miami, Florida 33130

SHEA AND GARDNER
734 Fifteenth Street, N.W.
Washington, D. C. 20005

September 14, 1966

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

Petitioners Jack T. Rainwater, Carole Alter, Mary E. Eppehimer, Mary J. Felkins, Joseph F. Hatcher, Rosalyn A. Nadler, and Donald O. Pinder pray that a writ of *certiorari* issue to review the judgment of the District Court of Appeal of Florida, Third District, in the above-entitled action which became effective on May 17, 1966.

Opinions Below

The *per curiam* opinion of the District Court of Appeal of Florida, Third District, filed on April 26, 1966, is reported at 186 So. 2d 278 and is printed as Appendix A hereto. The order of that court of May 17, 1966 denying a petition for rehearing, and the order of the Supreme Court of Florida of July 25, 1966 denying a petition for writ of *certiorari* are unreported and are printed as Appendices B and C hereto.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). The judgment of the District Court of Appeal of Florida was entered on April 26, 1966. A timely petition for rehearing was denied on May 17, 1966. The Supreme Court of Florida denied a petition for writ of *certiorari* on July 25, 1966. Mr. Justice Black, on August 15, 1966, extended the time for filing a petition for writ of *certiorari* in this Court until September 15, 1966.

Question Presented

Whether petitioners' privilege against self-incrimination protected by the Fourteenth Amendment to the United States Constitution was violated by their conviction under a State anti-gambling law, which conviction was based almost entirely upon records required by Federal Internal Revenue laws to be maintained by one of the petitioners, under circumstances where such records were first seized by Federal agents under a warrant alleging violation of Federal revenue laws, but subsequently turned over to State authorities, despite petitioners' objections, after the Federal Government determined not to prosecute petitioners.

Constitutional Provisions and Statutes Involved

This petition involves the Fifth and Fourteenth Amendments to the United States Constitution; Section 849.09 of the Florida Statutes; and the following provisions of the Federal Internal Revenue Code: 26 U.S.C. §§4401, 4403, 4411, 4412, 6806(c), and 7203. All the foregoing are printed in pertinent part as Appendix D hereto.

Statement of the Case

Petitioner Jack T. Rainwater in 1963 was a professional gambler subject to the Federal Internal Revenue laws pertaining to wagering. During the fiscal year ending June 30, 1963 this petitioner registered with the Internal Revenue Service as one engaged in the business of wagering, as required by 26 U.S.C. §4412 (Tr. 135);[1] paid the annual occupational tax imposed by 26 U.S.C. §4411 and held a tax stamp evidencing such payment (Tr. 133-134); maintained daily wagering records, as required by 26 U.S.C. §4403 (Tr. 96ff.); and paid the ten-percent excise tax on wagers imposed by 26 U.S.C. §4401 (Tr. 135-137). Failure to comply with these statutory requirements could have subjected this petitioner to heavy criminal penalties under 26 U.S.C. §7203. All other petitioners herein were merely employees of petitioner Rainwater in his wagering business (Tr. 7-11, 26, 43, 75-76).[2]

On April 19, 1963 special agents of the I.R.S. obtained a Federal warrant to search an apartment building in Miami, Florida, on the basis of affidavits by two such agents alleging criminal violations of the special wagering tax laws. (R. 60, 48, 53). The agents had ascertained from I.R.S. records that petitioner Rainwater held a special occupational wagering tax stamp and had been filing wagering excise tax returns with the I.R.S. (R. 56; Tr. 31). On April 20, 1963 Federal agents entered the building, which was then occupied by the petitioners, upon presenting the warrant, and were shown petitioner Rainwater's tax stamp

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[1] The citation "Tr." refers to the "Transcript of Testimony," and "R." to the "Transcript of Record," both certified by the Clerk of the District Court of Appeal of Florida, Third District, and filed herewith.

[2] These petitioners apparently did not take the above-described steps to comply with the Federal wagering tax laws (R. 58); but see *United States v. Calamaro*, 354 U.S. 351 (1957).

upon demand. (Tr. 16-17). The agents thereupon searched the premises, arrested the petitioners, and seized certain papers, books, memoranda, adding machines, and other wagering paraphernalia, all of which belonged to petitioner Rainwater. (Tr. 17, 43, 68-75). No officials of the State of Florida participated in these events. (Tr. 27).

All Federal criminal proceedings against petitioners were later dismissed by the Government (R. 73-80). However, representatives of the State of Florida requested from the Federal Government the opportunity to prosecute petitioners for violation of the State's anti-lottery law, *Fla. Stat. Ann.* §849.09, and were permitted to interview the Federal agents who participated in the search and seizure described above. (Tr. 146-147). As a result, on September 3, 1964 the State filed in the Dade County, Florida, Criminal Court of Record a five-count Information charging petitioners with violating the State's anti-lottery law. (R. 1-5). The only witness for the State supporting the Information was an agent of the I.R.S. (R. 5).

After pleading not guilty (R. 6), petitioners moved to quash the Information on the ground that disclosure by the Federal agents of the evidence of wagering obtained by them deprived petitioners of rights guaranteed them by the Fourth, Fifth, and Tenth Amendments to the United States Constitution and by certain provisions of the Florida Constitution. (R. 40-41). Petitioners also filed a motion to suppress the evidence seized by the Federal agents. (R. 32-35). Both motions were denied (R. 65), and a trial without a jury was had on July 20, 1965. The State called five witnesses, four of whom were I.R.S. agents who testified as to surveillance of petitioners during several weeks prior to April 20, 1963, and as to the search, seizure, and arrest on that date. (R. 65-67; Tr. 5-27, 48-50, 57, 59-66, 68-76, 90-114, 128). During the examination of these witnesses the State introduced, over objection, twenty-two exhibits,

twenty of which (Exhibits Nos. 3-22) were the items seized by Federal agents on April 20, 1963. (R. 66-67). The State's fifth witness was offered as an "expert" on lotteries and testified as to how in his opinion most of these exhibits were used by petitioners in conducting the wagering business. (Tr. 90-114).

Petitioners objected to the introduction of Exhibits Nos. 3-21 on the ground that most of these were records which petitioner Rainwater was required by Federal revenue laws to maintain and that their use against petitioners violated the Fourth and Fifth Amendments to the Constitution as made applicable to the States by the Fourteenth Amendment. (Tr. 80). The same argument was advanced, unsuccessfully, at the close of the State's case. (Tr. 131).

At the conclusion of the trial, the court found petitioner Rainwater guilty on all five counts of the Information and sentenced him to imprisonment for a period of five years. (R. 67, 81-82). The remaining petitioners were found guilty on Counts 2, 3, and 4 of the Information (R. 68-69), and received sentences of imprisonment ranging from six to eighteen months. (R. 82-92). Petitioners' motion for a new trial was thereafter denied. (R. 102-109).

Petitioners took a timely appeal to the District Court of Appeal of Florida, Third District, urging that they had been deprived by the trial court of rights guaranteed them by the Fourth, Fifth, Tenth, and Fourteenth Amendments to the United States Constitution and by certain provisions of the Florida Constitution. (R. 97-99). In a *per curiam* opinion filed on April 26, 1966, the District Court of Appeal affirmed petitioners' convictions and expressly rejected their contentions that the

> "... evidence obtained by federal officers ... was inadmissible in the state prosecution and that its use there violated their constitutional rights." (186 So. 2d 278; Appendix A).

A timely petition for rehearing was denied on May 17, 1966. (Appendix B).

Petitioners sought review by the Supreme Court of Florida.[3] Review by appeal appeared foreclosed;[4] but petitioners believed that the decision of the District Court of Appeal was in direct conflict with a prior decision of the Supreme Court of Florida in *Boynton* v. *State*, 75 So. 2d 211 (1954). In *Boynton* the court *en banc* held that evidence of compliance with the Federal Internal Revenue laws pertaining to wagering was inadmissible in an action brought by the State to enjoin as a nuisance defendant's wagering business, on the ground that the admission of such evidence would violate defendant's privilege against self-incrimination guaranteed by both the Federal and State Constitutions. 75 So. 2d at 216. Consequently, petitioners herein filed a timely petition for a writ of *certiorari* in the Supreme Court of Florida.[5] The petition was denied by that court without opinion on July 25, 1966. (Appendix C). Accordingly, the present petition to this Court is for a writ of *certiorari* to the District Court of Appeal of Florida, Third District.[6]

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[3] The complexities of Florida's system of appellate review as related to this Court's jurisdiction to review decisions of the Florida courts are illustrated by *Callendar* v. *State*, 151 So. 2d 80 (Fla. Sup. Ct. 1963), *cert. granted, judgment reversed*, 380 U.S. 519 (1965), *clarification requested*, 181 So. 2d 529 (Fla. Sup. Ct. 1966), *mandate recalled, order vacated, cert. granted to the District Court of Appeal, judgment reversed*, 383 U.S. 270 (1966).

[4] Under *Fla. Const. Art.* V §4(2), review by appeal appears to be limited to cases where the validity of a State or Federal statute or a controlling provision of the State or Federal Constitution is passed upon for the first time in the litigation by the decision of the District Court of Appeal.

[5] Review by *certiorari* by the Supreme Court of Florida on the ground of such a conflict in decisions is permitted by *Fla. Const. Art.* V §4(2).

[6] On August 6, 1966 petitioners filed a petition for re-hearing. However, the Supreme Court of Florida was then in recess which continued to September 6, 1966. As of the date of this petition for writ of *certiorari*, counsel for petitioners have been unable to ascertain whether or not the

Reasons for Granting the Writ

Petitioners' primary contention will be that the use of evidence of compliance with the record-keeping requirements of the Federal wagering tax laws (26 U.S.C. § 4403) in a State anti-gambling prosecution violated the privilege against self-incrimination guaranteed them by the Fifth Amendment as made applicable to the States by the Fourteenth Amendment. *Malloy* v. *Hogan,* 378 U.S. 1 (1964); *Murphy* v. *Waterfront Comm'n of N.Y. Harbor,* 378 U.S. 52 (1964); *Griffin* v. *California,* 380 U.S. 609 (1965); *Albertson* v. *SACB,* 382 U.S. 70 (1965). This issue is not controlled by the three decisions of this Court which upheld the registration and occupational tax provisions of the Federal wagering tax laws (26 U.S.C. §§ 4411, 4412), *United States* v. *Kahriger,* 345 U.S. 22 (1953); *Irvine* v. *California,* 347 U.S. 128 (1954); and *Lewis* v. *United States,* 348 U.S. 419 (1955). Those decisions merely held that registration and payment of the annual occupational tax were acts required to be performed prior to commencement of the business of wagering and that the privilege against self-incrimination applies only to evidence of past acts. However, in the present case, daily wagering records which formed the basis of the prosecution below were clearly evidence of past acts.

Supreme Court of Florida exercised its *certiorari* jurisdiction in denying the petition for *certiorari.* As a result, counsel was uncertain when petitioners' ninety-day period within which to file a petition for writ of *certiorari* in this Court began to run. To make sure that it is timely the present petition is therefore being filed within ninety days after the denial of the petition for rehearing by the District Court of Appeal on May 17, 1966, as extended to September 15, 1966 by Mr. Justice Black's order of August 15, 1966. However, should it subsequently become manifest that the July 25, 1966 Order of the Supreme Court of Florida was a denial of the petition for *certiorari* in the nature of an affirmance on the merits and not for lack of jurisdiction in that court, then petitioners respectfully request that any writ of *certiorari* issuing from this Court be directed to the Supreme Court of Florida.

Secondly, if the Court should determine that the present case falls within the ambit of the *Kahriger, Irvine,* and *Lewis* cases, petitioners will contend that these decisions should be reconsidered, on the ground that they are inconsistent with the Court's decision last Term in *Albertson* v. *SACB,* 382 U.S. 70 (1965). This issue is involved in another pending case which the Court has agreed to hear, *Costello* v. *United States,* 352 F. 2d 848 (2d Cir. 1965), *cert. granted,* 383 U.S. 942 (1966) (No. 826, 1965 Term; renumbered No. 41, 1966 Term), as well as in several other cases in which petitions for *certiorari* have been filed but not yet ruled upon. Petitioners now state in more detail below the reasons which warrant a grant of *certiorari* in what they believe is a case raising an important issue of first impression.

1. Petitioners believe that the statement of facts set out above demonstrates that the basis of their conviction was the introduction of a large quantity of books, records, equipment, and other lottery paraphernalia which had been seized by Federal Internal Revenue agents from the premises at which petitioner Rainwater conducted his wagering business. Four of the five witnesses for the State either testified to the seizure of this evidence or identified and described its nature. The fifth witness purported to explain how the evidence would be used to conduct a lottery. Substantially all the exhibits introduced by the State consisted of the seized lottery paraphernalia. We have here, therefore, evidence representing more than just a "link in the chain of evidence needed to prosecute. . . ." *Hoffman* v. *United States,* 341 U.S. 479, 486 (1951). Rather, the challenged evidence constituted admissions of guilt of the very violations of the State's anti-lottery law with which petitioners had been charged.

Petitioner Rainwater as the operator of a lottery was required by 26 U.S.C. § 4403 to "keep a daily record show-

ing the gross amount of all wagers" received. There cannot be much argument that the lottery paraphernalia seized by Federal agents and introduced in the prosecution below were precisely the type of "daily" records contemplated by the statute. They were the working records of the lottery itself from which petitioner Rainwater, and indeed the Internal Revenue Service, could compute the gross amount of wagers received and the ten-percent tax thereon. In this connection we would respectfully refer the Court to the informative decision in *Pinder* v. *United States,* 330 F. 2d 119 (5th Cir. 1964), where the court discussed the conduct of a lottery very similar to that involved in this case and held that the lottery paraphernalia seized by Federal agents were properly used by the Government to compute the tax owed on the gross amount of wagers made.[7]

Petitioners will contend that recent decisions of this Court enunciating the broad scope of the Fifth Amendment privilege against self-incrimination bar the use of the evidence of lottery records below. It is now settled that the Fifth Amendment privilege is applicable to the States through the Fourteenth Amendment. *Malloy* v. *Hogan,* 378 U.S. 1 (1964). It is equally clear that the Federal government may not compel evidence from an individual which would incriminate him under the laws of a State. *Murphy* v. *Waterfront Comm'n of N.Y. Harbor,* 378 U.S. 52 (1964). In *Murphy,* the evidence was sought to be compelled by a bi-state commission, and the evidence would not have been incriminatory under the laws of the two States because of statutory grants of immunity. However, no such statutory protection was afforded by Federal law, and the Court held

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[7] See also *Hodoh* v. *United States,* 153 F. Supp. 822 (N.D. Ohio 1957), where plaintiff did not keep the type of lottery records which petitioner Rainwater herein maintained. This failure to comply with the Federal record-keeping requirement necessitated the estimates by the Government as to the amount of tax due of which plaintiff there unsuccessfully complained.

that petitioner could be compelled to testify only by forbidding the Federal government to use the evidence in a Federal prosecution. In the present case, the lottery records may not have been incriminatory under Federal law where wagering is not unlawful, but under *Murphy* such evidence could only be compelled if the State of Florida were precluded from using it in a criminal prosecution. Under *Griffin* v. *California*, 380 U.S. 609, 614 (1965), neither the State nor Federal government may cut "down on the privilege by making its assertion costly." Here, petitioner Rainwater could assert his privilege by refusing to comply with the record-keeping requirement imposed by 26 U.S.C. § 4403 only at the cost of subjecting himself to Federal criminal penalties under 26 U.S.C. § 7203. Requiring petitioner Rainwater to choose between asserting the privilege and going to jail is clearly forbidden by this Court's decision last Term in *Albertson* v. *SACB*, 382 U.S. 70 (1965).[8] Petitioners submit that the foregoing decisions at the least raise such doubts as to the validity of one sovereign's using evidence which has been compelled by another sovereign in the manner approved by the courts below in this case as to warrant further amplification by the Court of the applicability of the Fifth Amendment privilege to the Federal wagering tax laws.

2. The constitutionality of certain portions of the Federal wagering tax laws in light of the Fifth Amendment privilege has been before this Court in *United States* v. *Kahriger*, 345 U.S. 22 (1953); *Irvine* v. *California*, 347 U.S. 128 (1954); and *Lewis* v. *United States*, 348 U.S. 419 (1955). Petitioners will contend that those decisions in favor of constitutionality are not determinative of the issue in this case.

In *Kahriger* defendant was convicted in a Federal court for failing to register with the Internal Revenue Service

[8] The *Albertson* case also removes any doubt that the privilege applies to evidence compelled both orally and in writing. 382 U.S. at 78.

as one engaged in the business of wagering and for failing to pay the annual $50 occupational tax, as required by 26 U.S.C. §§ 4411, 4412. This Court rejected the contention that by being required to register, pay the tax, and acquire a stamp evidencing such payment, defendant would be compelled to incriminate himself under the laws of Pennsylvania where wagering was illegal. The Court found that registration and payment of the tax would not be incriminatory, because those are acts required before commencing the wagering business, whereas the Fifth Amendment privilege pertains only to past acts. The Court stated:

> "Under the registration provisions of the wagering tax, appellee is not compelled to confess to acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions." 345 U.S. at 32, 33.

In the *Irvine* case the State introduced into evidence in an anti-gambling prosecution defendant's occupational tax return and stamp denoting payment of the tax. The Fifth Amendment contention was rejected by this Court on the authority of *Kahriger*. 347 U.S. at 130 n. 4.

Finally, *Lewis* involved a Federal prosecution for failure to register and pay the occupational tax where defendant asserted that to have complied with the statute would have incriminated him under the District of Columbia laws against gambling. Relying once again on *Kahriger*, this Court construed the Federal wagering tax statute as requiring registration and payment of the occupational tax prior to engaging in the wagering business. Since the evidence produced by registering related only to acts which might or might not occur in the future, the Fifth Amendment privilege did not come into play. 348 U.S. at 422.

That portion of the wagering tax statute which requires the maintenance of daily wagering records, 26 U.S.C. § 4403, was not involved in any of the *Kahriger*, *Irvine*, or *Lewis* cases, and has not been construed by the Court. There cannot be much argument that a record of wagers received in any given day, from which the excise tax imposed by 26 U.S.C. § 4401 can be computed, is evidence of past, not future, acts of wagering. Indeed, the instant case demonstrates that this type of evidence of past acts of wagering without more is sufficient to bring about a conviction under a law which makes gambling illegal. It is thus difficult to see how the present case can be controlled by the reasoning of the Court in deciding *Kahriger*, *Irvine*, and *Lewis*.

3. In *Lewis* v. *United States*, the Court, as noted above, relied upon the rule in *Kahriger* that registration and payment of the annual occupational tax as required by 26 U.S.C. §§ 4411, 4412 related only to future acts of wagering and thus the Fifth Amendment privilege was not applicable. However, Mr. Justice Minton in speaking for the majority added to this rationale the dictum that the disclosures made in registration and payment of the occupational tax were not compelled by the statute but were voluntary acts.

> "The fact that [petitioner] may elect to pay the tax and make the prescribed disclosures required by the Act is a matter of his choice. There is nothing compulsory about it, and consequently, there is nothing violative of the Fifth Amendment." 348 U.S. at 422.

Of course in *Lewis* the Court had before it only the applicability of the privilege in the context of a Federal prosecution for failure to comply with the registration and occupational tax provisions of the statute. If there were no other relevant decisions by the Court on the subject petitioners would urge that the above stated dictum in *Lewis* should be

reconsidered now in the context of a State prosecution grounded upon evidence of petitioners' compliance with substantially all the provisions of the Federal statute. But petitioners will contend that the Court has not only refused to give the Fifth Amendment privilege such a restrictive interpretation in recent years in the *Malloy*, *Murphy*, and *Griffin* cases, but actually has nullified the *Lewis* dictum in *Albertson* v. *SACB*, 382 U.S. 70. There, the Court held that Sections 8(a) and (c) of the Subversive Activities Control Act of 1950, 50 U.S.C. § 787(a) and (c), and orders thereunder requiring petitioners to register as members of the Communist Party by completing and filing registration statements, violated the Fifth Amendment privilege. Compliance with the registration requirement, however, could have been avoided by an individual member by terminating his Party membership within thirty days after the SACB had ordered the Party to register under 50 U.S.C. § 786(a). And of course, a *prospective* member could avoid registration by choosing to remain outside of the Party membership. 50 U.S.C. § 787(a). These options did not save the statute in *Albertson*. We can perceive no relevant distinction between "the decision which would-be gamblers must make at the threshold," *Lewis* v. *United States*, 348 U.S. at 422, and the decision confronting those who were members or desired to be members of the Communist Party. The Court in *Albertson*, by upholding the privilege, refused to compel one to make that decision without the protection of the Fifth Amendment. In short, the *Albertson* case has sustained the view of Mr. Justice Black in his dissent in *Lewis* that while gamblers have "no constitutional right to gamble," "... if we remain faithful to the letter and spirit of the Bill of Rights, gamblers, like others, have a right to invoke its safeguards." 348 U.S. at 425.

4. Petitioners do not believe that in order to sustain their position the Court must necessarily reconsider its decisions

in *Kahriger, Irvina,* and *Lewis,* save perhaps for the dictum in *Lewis* discussed in the preceding portion of this petition. Nevertheless, recent decisions of the Court, *Albertson* in particular, surely have cast doubt upon the constitutionality of even the registration and occupational tax provisions of the wagering tax statute; and if compliance with these provisions cannot be compelled without abridgment of Fifth Amendment rights, *a fortiori* the convictions below based upon evidence of compliance with the record-keeping provisions of the statute cannot stand.

The question of the applicability of the Fifth Amendment privilege to the registration and occupational tax provisions of the wagering tax laws in the light of the *Albertson* decision is now pending before this Court in *Costello* v. *United States* where certiorari has been granted.[9] Moreover, this and closely related issues are now the subject of no fewer than ten other cases in which petitions for *certiorari* have been filed but not yet acted upon.[10] Each of these cases, however, stems from Federal prosecution for failure to comply with provisions of the wagering tax statute. It would thus appear particularly appropriate for the instant case to be heard with *Costello.* In *Lewis* the Court

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[9] 352 F.2d 848 (2d Cir. 1965), *cert. granted,* 383 U.S. 942 (1966) (No. 826, 1965 Term; renumbered No. 41, 1966 Term).

[10] *Marchetti* v. *United States,* 352 F. 2d 848 (2d Cir. 1965) (No. 823, 1965 Term; renumbered No. 38, 1966 Term); *Millo* v. *United States,* 354 F. 2d 224 (2d Cir. 1965) (No. 902, 1965 Term; renumbered No. 55, 1966 Term); *Grassia* v. *United States,* 354 F. 2d 27 (2d Cir. 1965) (No. 906, 1965 Term; renumbered No. 56, 1966 Term); *Moretti* v. *United States,* — F. 2d — (2d Cir. 1965) (No. 951, 1965 Term; renumbered No. 64, 1966 Term); *Markis* v. *United States,* 352 F. 2d 860 (2d Cir. 1965) (No. 848, 1965 Term; renumbered No. 43, 1966 Term); *Piccioli* v. *United States,* 352 F. 2d 856 (2d Cir. 1965) (No. 849, 1965 Term; renumbered No. 44, 1966 Term); *Stone* v. *United States,* 357 F. 2d 257 (5th Cir. 1966) (No. 1162, 1965 Term; renumbered No. 96, 1966 Term); *Driscoll* v. *United States,* 356 F. 2d 324 (1st Cir. 1966) (No. 1174, 1965 Term; renumbered No. 97, 1966 Term; renumbered No. 97, 1966 Term); *DeCesare* v. *United States,* 356 F. 2d 107 (5th Cir. 1966) (No. 1201, 1965 Term; renumbered No. 99, 1966 Term); *Grosso* v. *United States,* 358 F. 2d 154 (3rd Cir. 1966) (No. 1363, 1965 Term; renumbered No. 181, 1966 Term).

remarked that petitioner's "complaint is that if he had [a tax stamp] he might get in trouble. Since petitioner is without a stamp, he is not in a position to raise the question as to what might happen to him if he had one." 348 U.S. at 423. Petitioners herein certainly are in such a position, and the instant case reveals the full consequences of compliance with the Federal statutory requirements. Whatever may be said concerning the requirements of registration, once daily wagering records are maintained in obedience to 26 U.S.C. § 4403 and disclosed without protection of the Fifth Amendment, conviction under State anti-gambling laws becomes nearly routine. Petitioners therefore respectfully submit that by hearing both *Costello* and instant case it will have presented to it more fully the question of the applicability of the Fifth Amendment privilege to the Federal wagering tax statutes.

Conclusion

For the foregoing reasons, this petition for writ of *certiorari* should be granted.

Respectfully submitted,

ALFRED L. SCANLAN
DAVID BOOTH BEERS
734 Fifteenth Street, N.W.
Washington, D. C.
Attorneys for Petitioner.

Of Counsel:

J. EDWARD WORTON
525 Pan American Bank Building
Miami, Florida

MALLORY H. HORTON
308 Concord Building
Miami, Florida 33130

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D. C.

September 14, 1966

APPENDIX A

Not final until time expires to file rehearing petition and, if filed, disposed of.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

January Term, A.D. 1966

Case No. 65-638

JACK T. RAINWATER, CAROLE ALTER, MARY E. EPPEHIMER, MARY J. FELKINS, JOSEPH F. HATCHER, ROSALYN A. NADLER, AND DONALD O. PINDER, *Appellants*,

vs.

THE STATE OF FLORIDA, *Appellee*.

Opinion filed April 26, 1966.

An Appeal from the Criminal Court of Record for Dade County, JACK M. TURNER, Judge.

J. EDWARD WORTON, for appellants.

EARL FAIRCLOTH, Attorney General, HERBERT P. BENN, First Assistant Attorney General and GEORGE R. GEORGIEFF, Assistant Attorney General, for appellee.

Before HENDRY, C.J., and PEARSON and CARROLL, JJ.

PER CURIAM.

On this appeal by the defendants following conviction for violation of the statute prohibiting a lottery (§ 849.09, Fla. Stat., F.S.A.) three points are presented.

First, it is contended that evidence obtained by federal officers under a search warrant, on the basis of which prosecution under federal law was instituted but later abandoned,

was inadmissible in the state prosecution and that its use there violated their constitutional rights. We rejected that contention, with reference to such evidence, when it was raised in the recent case of Christian v. State, Fla.App.1965, 176 So.2d 561, and on authority thereof we hold the appellants' first point is not meritorious.

Secondly, it is contended by appellants that the trial court erred in refusing to admit certain documents offered in evidence to show that the failure of the federal government to prosecute was for the announced reason that the evidence was considered insufficient upon which to obtain a conviction for violation of federal law. Such evidence was not material in the prosecution under state law, and the trial court's refusal to permit it to be shown was not error.

Appellants' third contention, that the evidence was insufficient, is not borne out by the record.

No reversible error having been made to appear, the judgment appealed from is affirmed.

Affirmed.

APPENDIX B

IN THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

January Term, A.D. 1966, Tuesday, May 17, 1966

Case No. 65-638

JACK T. RAINWATER, CAROLE ALTER, MARY E. EPPEHIMER, MARY J. FELKINS, JOSEPH F. HATCHER, ROSALYN A. NADLER AND DONALD O. PINDER, *Appellants*,

vs.

THE STATE OF FLORIDA, *Appellee*.

Counsel for appellants having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

A True Copy

Attest:

Clerk District Court of Appeal, Third District.

APPENDIX C

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1966

MONDAY, JULY 25, 1966

Case No. 35,422

JACK T. RAINWATER, ET AL., *Petitioners,*

vs.

THE STATE OF FLORIDA, *Respondent.*

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the District Court of Appeal, Third District of Florida, in said cause bearing date April 26, 1966, and the record having been inspected, it is ordered that said Petition be and the same is hereby denied.

A True Copy

Test:

/s/ Sid J. White
Clerk Supreme Court.

APPENDIX D

1. United States Constitution, Amendment V:

"No person. . . shall be compelled in any criminal case to be a witness against himself. . . ."

2. United States Constitution, Amendment XIV:

"Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. Florida Statutes Annotated:

"849.09 *Lottery prohibited*

(1) It shall be unlawful for any person in this state to:

(a) Set up, promote, or conduct any lottery for money or for anything of value; or

(b) Dispose of any money or other property of any kind whatsoever by means of any lottery; or

(c) Conduct any lottery drawing for the distribution of a prize or prizes by lot or chance, or advertise any such lottery scheme or device in any newspaper or by circulars, posters, pamphlets, radio, telegraph, telephone, or otherwise; or

(d) Aid or assist in the setting up, promoting or conducting of any lottery or lottery drawing, whether by writing, printing or in any other manner whatsoever, or be interested in or connected in any way with any lottery or lottery drawing; or

(e) Attempt to operate, conduct or advertise any lottery scheme or device; or

(f) Have in his possession any lottery wheel, implement or device whatsoever for conducting any lottery or scheme for the disposal by lot or chance of anything of value; or

(g) Sell, offer for sale, or transmit, in person or by

mail or in any other manner whatsoever, any lottery ticket, coupon, or share, or any share in or fractional part of any lottery ticket, coupon or share, whether such ticket, coupon or share represents an interest in a live lottery not yet played or whether it represents, or has represented, an interest in a lottery that has already been played; or

(h) Have in his possession any lottery ticket, or any evidence of any share or right in any lottery ticket, or in any lottery scheme or device, whether such ticket or evidence of share or right represents an interest in a live lottery not yet played or whether it represents, or has represented, an interest in a lottery that has already been played; or

(i) Aid or assist in the sale, disposal or procurement of any lottery ticket, coupon or share, or any right to any drawing in a lottery; or

(j) Have in his possession any lottery advertisement, circular, poster or pamphlet, or any list or schedule of any lottery prizes, gifts or drawings.

(2) Any person who is convicted of violating any of the provisions of paragraphs (a), (b), (c) or (d) of subsection (1) of this section shall be punished by imprisonment in the state prison for not less than one year nor more than five years.

(3) Any person who is convicted of violating any of the provisions of paragraphs (e), (f), (g) or (i) of subsection (1) of this section shall be punished by imprisonment in the county jail for not less than ninety days nor more than one year; provided that any person who, having been convicted of violating any provision thereof, thereafter violates any provision thereof shall be punished, upon conviction, by imprisonment in the state prison for not less than one year nor more than five years.

(4) Any person who is convicted of violating any of the provisions of paragraphs (h) or (j) of subsection (1) of this section shall be punished by imprisonment in the county jail for not less than ninety days nor

more than one year or by fine of not less than one hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment; provided, that any person who, having been convicted of violating any provision thereof, thereafter violates any provision thereof shall be punished, upon conviction, by imprisonment in the state prison for not less than one year nor more than five years, or by fine of not less than five hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment."

4. 26 U.S.C. §4401:

"§4401. *Imposition of tax*

(a) *Wagers.*—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) *Amount of wager.*—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) *Persons liable for tax.*—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him."

5. 26 U.S.C. §4403:

"§4403. *Record requirements*

Each person liable for tax under this subchapter shall keep a daily record showing the gross amount of all wagers on which he is so liable, in addition to all other records required pursuant to section 6001(a)."

6. 26 U.S.C. §4411:

"§4411. *Imposition of tax*

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable."

7. 26 U.S.C. §4412:

"§4412. *Registration*

(a) *Requirement.*—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) *Firm or company.*—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) *Supplemental information.*—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental

information from any person required to register under this section as may be needful to the enforcement of this chapter."

8. 26 U.S.C. §6806(c):

"(c) *Occupational wagering tax.*—Every person liable for special tax under section 4411 shall place and keep conspicuously in his principal place of business the stamp denoting the payment of such special tax; except that if he has no such place of business, he shall keep such stamp on his person, and exhibit it, upon request, to any officer or employee of the Treasury Department."

9. 26 U.S.C. §7203:

"§7203. *Willful failure to file return, supply information, or pay tax*

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."



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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. ~~555~~ 18

JACK T. RAINWATER, ET AL.,
Petitioners,

vs.

STATE OF FLORIDA,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

EARL FAIRCLOTH
Attorney General
State of Florida

GEORGE R. GEORGIEFF
Assistant Attorney General
State of Florida

Counsel for the Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 555

JACK T. RAINWATER, ET AL.,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Comes now the State of Florida, respondent in the above-styled cause, by and through its undersigned counsel and would show as follows:

OPINIONS BELOW

Respondent has no quarrel with the opinions included by petitioners in their petition at appendices A, B, and C.

JURISDICTION

Respondent concedes that the naked jurisdiction of this Court is probably invoked under 28 United States Code, Section 1257 (3).

QUESTION PRESENTED

Respondent accepts the question presented as posed by petitioners in their petition at page two.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondent accepts those constitutional provisions and statutes involved which petitioners set out in their petition at page two but would add thereto all of the sections of the federal internal revenue code as found in 26 United States Code from §§ 4401 through 4423, specifically including § 4422 thereof.

STATEMENT OF THE CASE

Respondent accepts petitioners' statement of the case as the same appears in their petition at pages three through six noting only that so much of it as may be said to constitute an argument of the cause is hereby rejected. We will not endeavor to make any corrections thereof except insofar as it may become necessary or desirable in the argument for denying the writ to be presented post.

ARGUMENT

Not unlike petitioners, respondent's primary contention will be that the use of the evidence in this state prosecution for a violation of Section 849.09, Florida Statutes, in no way violated the privilege against self-incrimination allegedly assured petitioners by the Fifth Amendment to the federal constitution as made applicable by the Fourteenth Amendment of the United States Constitution. Without regard to the view one may take of the applicability of *United States v. Kahriger*, 345 U.S. 22 (1953); *Irvine v. California*, 347 U.S. 128 (1954); and *Lewis v.*

United States, 348 U.S. 419 (1955), those cases may not be discounted in their entirety here and in no wise must they be reconsidered with a view to the correctness of their being continued as the applicable law.

In order that this Court may be fully aware of just what the actual physical exhibits were in the case below, its attention is invited to the motion in opposition to application for stay of mandate filed by respondent on or about September 28, 1966. At pages two and three thereof respondent set out a complete list and description with the page of introduction of the exhibits involved, they being both the state's and the defendant's exhibits.

We doubt that petitioners mean to say either directly or indirectly that the regulatory measures encompassed by 26 United States Code, §§ 4401-4423 were in any sense of the word meant to overrule the then existing prohibitions of the several states against gambling. Indeed Section 4422 of Title 26 specifically states the contrary.

Just as surely, at least respondent so assumes, it could not be said that petitioners' quarrel is with the constitutionality of the alleged incriminatory nature of the wagering stamp requirements. For if they do mean to suggest that they are unconstitutional as requiring one who seeks to comply therewith to incriminate himself and if this Court in its ultimate disposition of *Costello v. U.S.*, No. 41, October Term, 1966, does hold them unconstitutional then surely insofar as petitioners are concerned, all hope is gone.

If, on the other hand, they simply contend that the use of these articles in evidence against them was improper for some other reason (we know not what) then at least we understand that complaint albeit we cannot join therein.

What petitioners contend seems to be that they are placed on the horns of a legal dilemma in that they are required under federal law to keep certain records which records later became evidence in their prosecution for a violation of the law of the State of Florida. From this they conclude that it would be absurd to permit a conviction so obtained to stand. It well may be that respondent either does not understand the point they seek to make or, even worse, misses it completely but even if respondent is thought to be as absurd as we consider the dilemma of which they speak, is it not more accurate to say that what they really mean is that they were free to violate the law of Florida proscribing lotteries because in so doing they not only had not violated certain regulatory provisions of the federal law but in fact had complied with them?

One thing is certain, respondent did not say then, does not say now and is not likely to say that petitioners had to run a prohibited lottery in Florida. Respondent maintains stoutly that when and if petitioners or anyone else operates a lottery prohibited under Florida law, they are subject to prosecution without regard to any alleged compliance with federal regulations over such activities.

Speaking of the federal regulations, we consider it appropriate to observe that the regulations have nothing to do with the operation of the lottery. They are simply in existence to insure (for tax purposes) the federal government a fair count. If an ordinary citizen may, at the instance of the Internal Revenue Service, be required to back up his deductions and/or exemptions, have these regulatory provisions done anything more than spell out that same requirement to those who elect to purchase a federal wagering stamp and operate therewith? It was

never the intent of the legislation enacting the wagering stamp or indeed the Internal Revenue Service regulatory provisions occasioned thereby, to insure those purchasing a stamp and complying with the records requirements that they were free to violate a state's laws with impunity. See § 4422, supra.

If we adopt the rationale of petitioners, would it not follow that one who manufactures moonshine in the dim recesses of Florida's "piney woods" and pays the federal tax thereon would be free from criminal prosecution at the hands of the state authorities for having in his possession in Florida that same moonshine on which he failed to pay the state tax? Conversely, could it be said that he could escape federal prosecution for not having paid the federal tax on that moonshine by the simple advent of paying the state tax thereon? Respondent's observation is that if the former is true, then surely the latter must as well be true and yet who among us would characterize that as anything but an incredible suggestion? Florida has no interest in and indeed no jurisdiction to prosecute one who possesses moonshine whiskey but has failed to pay the federal tax thereon—it is indeed quite limited to a prosecution for having failed to pay the state tax thereon. Certainly the reverse is true.

It is incorrect to say that either directly or indirectly petitioners were rendered immune from state prosecution here simply because a search happened to reveal the existence of certain matters of physical evidence set out above without regard to whether those articles were within the contemplation of the regulatory provisions of the Internal Revenue Service. Can there be any doubt but that petitioners could have been prosecuted criminally for income tax evasion based upon the very records they say they were required to keep? We think not. If indeed the federal government could so prosecute them, how can it be said that the State of Florida surrendered its right to prosecute these petitioners when they purchased a federal wagering stamp and allegedly kept certain records. We know of no provision of either constitutional, statutory, or case law at the federal level

or otherwise which directly or indirectly suggests such an obviously desirable (as to petitioners) outcome.

Indeed the question recurs with alarming frequency. What petitioners really mean to suggest is that they have the option of complying with the federal regulatory provisions here involved and hopefully defeating a state conviction secured *inter alia* with the records to which those provisions relate.

Should not their complaint be against the legislation requiring the keeping of the records and a federal prosecution for the failure to do so? This must be so because it is the federal regulation upon which they bottom their complaint and not *vel non* the state conviction. Respondent contends that if their plea of forced incrimination has any validity, it must be one directed to the legislation or regulations which require it and not to matters jurisdictionally independent thereof.

To hold otherwise would be to vest in every given violator, present or future, the choice of violating Florida's law against gambling certain in the knowledge that he could get his conviction reversed simply by showing compliance with these regulations. It occurs to respondent that this perhaps is a classic example of the tail wagging the dog. It is bad enough that the lay consensus today is that the criminals have all the best of it—a ruling by this Court in accord with petitioners' wishes would surely remove all doubt thereof. Indeed it would go to the end of the horizon in giving a green light to violations of state criminal laws by the simple expedient of compliance with federal regulations.

It must be remembered that there is no federal proscription

against lotteries or wagering as a substantive crime. The only limitation is one requiring a federal wagering stamp and as an adjunct thereto, the keeping of certain records, so that those covered thereby might prove up their returns should the Internal Revenue Service consider it necessary. If they comply with these mandates, they certainly get no immunity from a state gambling prosecution based upon evidence which included records kept in such compliance. See *Bartkus v. Ill.*, 359 U.S. 121, 3 L. ed. 2d 684, 79 S. Ct. 676, reh den 360 U.S. 907, 3 L. ed. 2d 1258, 79 S. Ct. 1283, and *Abbate v. U.S.*, 359 U.S. 187, 3 L. ed. 2d 729, 79 S. Ct. 666.

Adverting to the constitutionality about which petitioners so glibly speak, certainly the cases of *Shapiro v. U.S.*, 335 U.S. 1, 92 L. ed. 1787; *United States v. Kahriger*, supra, and *Lewis v. U.S.*, supra, are still applicable. If they find that concept not so much to their liking, then the compelling resume submitted above should be more than enough reason to find that the court below was eminently correct in ruling as it did.

So much of petitioners' complaint as may be said to have its genesis in the fact that the search was conducted by federal authorities rather than state authorities must as well die from exhaustion. If there be anything to that contention, it would have to follow that if (unlike here) the state authorities had exclusively been responsible for the search and seizure and the subsequent prosecution and conviction with the same evidence it would not necessarily be violative of federal law. However, we observe that the exhibits or physical evidence is the same as that allegedly required under federal law and which would have been used under a federal prosecution. We observe that the search here involved was found to be legally antiseptic after several assaults thereon with the articles simply being turned

over to the state authorities and prosecution based thereon.

How foolish it would be to urge that the state could prosecute in the one instance and not in the other. With the principals, the crime, and the evidence being identical, hopefully such a position could never satisfactorily be urged in this or any other court.

Even more absurd would be the suggestion that petitioners could never be prosecuted for a violation of Florida's lottery law if they were simply careful enough to keep on the premises of their nefarious endeavor only those records required under federal law.

CONCLUSION

It is respectfully submitted that the decision of the District Court of Appeal in and for the Third District of Florida was eminently correct and the petition for writ of certiorari should be denied.

Respectfully submitted,

EARL FAIRCLOTH
Attorney General
State of Florida

GEORGE R. GEORGIEFF
Assistant Attorney General
State of Florida
Counsel for the Respondent.

PROOF OF SERVICE

This is to certify that I have forwarded a copy of the foregoing Response to Petition for Writ of Certiorari to the Honorable Alfred L. Scanlan, 734-15th Street, N.W., Washington, D.C. 20005, counsel for the petitioners, by mail, this_____ day of December, 1966.

GEORGE R. GEORGIEFF
Assistant Attorney General
State of Florida

Of Counsel for the Respondent.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 555

JACK T. RAINWATER, CAROLE ALTER, MARY E. EPPEHIMER, MARY J. FELKINS, JOSEPH F. HATCHER, ROSALYN A. NADLER AND DONALD O. PINDER, PETITIONERS

v.

THE STATE OF FLORIDA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEALS OF FLORIDA, THIRD DISTRICT

MEMORANDUM FOR THE UNITED STATES

1. On November 14, 1966, the Court requested the Solicitor General to express the views of the United States in the above-entitled case. In light of the matters noted in paragraph 2 below, we do not consider at length the legal issues presented in this case. We do point out that, if in *Marchetti* v. *United States,* No. 38, this Term,[1] and *Grosso* v. *United States,* No. 181, this Term, the Court's *Kahriger* and *Lewis* decisions are followed, petitioners' State convictions

[1] We assume that the Court will hear No. 38 in light of the abatement of *Costello* v. *United States*, No. 41, this Term.

242-849—66

would appear to involve no violation of Fifth Amendment rights. Should the Court, however, adopt a use-restriction rule, as alternatively suggested in the government's briefs in Nos. 41 and 181, this may be an appropriate case in which to apply such a rule to require the exclusion of evidence and other information obtained as a result of petitioner Rainwater's compliance with the federal wagering tax laws.[2] Cf. *Boynton* v. *State*, 75 So. 2d 211 (Fla.).

2. Subsequent to November 14, 1966, and in keeping with the review policy described in our Supplemental Memorandum in *Schipani* v. *United States*, No. 504, this Term (pp. 4–5), the Department of Justice has ascertained that electronic surveillance indirectly involving two of petitioners was conducted by agents of the federal government during 1962. None of petitioners here was the subject of direct electronic surveillance, but petitioners Rainwater and Alter were participants in conversations which were electronically monitored. This monitoring was done by means of a microphone, installed by trespass, at a business establishment where petitioner Rainwater and others frequently met, and provided investigatory leads to petitioners and to the location of petitioner Rainwater's place of business. Subsequently, physical (not electronic) surveillance by other federal agents of this place of business and of several of petitioners ensued. On the basis of all of the information ob-

[2] Rainwater, we note, was the only one of petitioners who had registered under the provisions of the federal wagering tax laws.

tained, a search warrant was procured for petitioner Rainwater's place of business. Pursuant to a search of said premises, evidence was obtained which was subsequently turned over to authorities of the State of Florida. All petitioners here were present when and at the place where the search warrant was executed. There is no reason to believe that State authorities knew of the possible taint.

3. We have notified appropriate Florida officials of the matters here discussed, and have served copies of this memorandum on such officials and on petitioners' counsel. Since this case involves State, not federal, convictions, we regard it as inappropriate to suggest a disposition, leaving that to the parties directly involved.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JANUARY 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

RAINWATER ET AL. *v.* FLORIDA.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

No. 18. Decided March 4, 1968.

PER CURIAM.

The petition for a writ of certiorari is granted, the judgment of the court below is vacated, and the case is remanded for further consideration in the light of *Marchetti* v. *United States*, 390 U. S. 39. Cf. *Hoffa* v. *United States*, 387 U. S. 231; *Kolod* v. *United States*, 390 U. S. 136.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.